IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1304

PAGE AIRWAYS, INC., ET AL.,

Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS RESTATED

1. Whether the petition should be granted to review jury instructions which were in substantially the form repeatedly demanded of the District Court by Petitioners and admittedly in conformance with *Brown Shoe Co.* v. *United States.*

2. Whether the petition should be granted to review the jury instructions on "injury to competition" which were given in substantially the form repeatedly demanded of the District Court by Petitioners, but which Petitioners now erroneously claim have created a conflict among Courts of Appeal.

3. Whether the petition should be granted to review jury instructions and a jury verdict adverse to Petitioners under Section 2 of the Sherman Act when the instructions submitted were substantially those requested by Petitioners.

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STATEMENT OF THE CASE

The evidence of record on which Respondent based its case and to which the jury gave credence is well summarized in the opinion of the Court of Appeals. App. A at 1a-8a.[1] Petitioners' "Statement of Facts" and review of the proceedings below correctly recite the length of trial (June 6, 1977 through August 23, 1977), the nature of the jury's 15 special verdicts and the amount of the judgment. Otherwise, the Petition selectively incorporates evidence and inferences previously argued and rejected and in many instances omits facts which have previously proved painful to Petitioners' cause. In some instances, Petitioners' factual recitation is simply wrong.

A brief, factual overview will serve to reveal how the relevant market came into being and the nature of the antitrust violations involved.

[1] Appendix references are to Appendix A of Petitioners' appendices to Petition for Writ of Certiorari (the Opinion of the Court of Appeals), or the Joint Appendix (CA App.).

In 1966, Grumman American Corporation commenced to manufacture and sell the Gulfstream II (G-II), a business aircraft, which was larger, had greater range (transoceanic), and required substantially more sophisticated and expensive avionics than any produced before or since. App. A at 3a-4a. Grumman American did not install avionics in its "green" aircraft. App. A at 2a. Thus, the introduction of the G-II created a clear business opportunity for those few companies with the technical and financial resources and know-how to enter this new marketplace. Respondent, Associated Radio Service Company, elected to gain such an entry.

After contracting for avionic installations in some of the early G-IIs, Associated sought to enhance its profitability by entering into a sales representation agreement with Petitioner, Page Airways, Inc., in 1968. App. A at 4a.

Avionics in G-II aircraft is a unique, highly sophisticated electronics system by which a pilot operates the aircraft. This avionics system is composed of flight control, navigation and communication subsystems, which subsystems must be designed and installed to function or interface with each other and other systems in the G-II. App. A at 2a n.3. Each competing installer designed and obtained certifications of airworthiness from the Federal Aviation Administration after lengthy analysis and testing of the G-II avionics system before being able to offer it for sale. App. A at 5a. An avionics system designed for use in any other aircraft is unusable in a G-II. App. A at 3a-4a. Only ten companies have ever competed for G-II avionics business. The number of companies able to compete effectively for G-II outfitting contracts dwindled from eight or nine in 1968 to about five in 1977. App. A at 4a-5a.

Prior to August, 1973, the entry barriers into the G-II avionics market were significant. Unusual hangar facilities, complex engineering studies and drawings, FAA licensing of the facility (including its employees, operations and quality control

its contract with Associated expired, and Petitioners decided to do so at least as early as 1971. App. A at 6a. Petitioners did not have a sufficiently large hangar, G-II avionics system engineering, experienced personnel, FAA certification, or any other qualifications to commend it to a potential customer. Therefore, through a series of predatory acts calculated to destroy Associated, the most significant competitor, Petitioners commenced their drive to enter and dominate the market. They succeeded. App. A at 6a-8a, 18a-19a.

Prior to August 1973, Associated had about 51% of the G-II avionics market and was the most significant competitor. App. A at 5a n. 6, 18a n. 18. Petitioners literally eliminated Associated as a competitor in August 1973. Associated's market share went from 51% to 0%. For approximately one year thereafter, Associated did not have the physical or financial capability to offer even minimal competition. Petitioners acquired over 10% of the market during the last three months of 1973, 50% of the market in 1974, and by trial time had 64%. App. A at 5a n. 6, 18a. Petitioners found bribery of customers and Grumman employees to be an effective method of foreclosing portions of the market to the competition. App. A at 6a-8a. During this same time the number and vitality of the competitors decreased (App. A at 4a-5a), and the price of G-II avionics installation substantially increased, as did Gulfstream's profits. App. A at 18a n. 19. The ranks of the competitors were reduced, and those remaining were relegated to a bare subsistence volume of business that can reasonably be anticipated in a market controlled by a monopolist. App. A at 4a, 5a n. 6.

REASONS FOR DENYING THE WRIT

I.

THE MARKET DEFINITION INSTRUCTIONS IN THIS CASE ARE CONSISTENT WITH ESTABLISHED SUPREME COURT AUTHORITY AND WITH THE VERY INSTRUCTIONS REPEATEDLY REQUESTED BY PETITIONERS

This Court's longstanding and sound analysis in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) of the practical indicia to be taken into account in making a determination of relevant product market in antitrust cases should not be disturbed. Nevertheless, Petitioners now attack the market determination methodology of *Brown Shoe* because it allegedly "does not provide adequate or proper guidance to a factfinder" (Petition, p. 11), and call upon this Court to take a "much needed step toward clarifying a muddled area of antitrust law" (Petition, p. 19). Petitioners ignore the fact that the Court has been proffered similar, identical opportunities in the past. *See, e.g., Heatransfer Corp.* v. *Volkswagenwerk, A. G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Petitioners also ignore the fact that *all* parties, as well as the trial court and the Court of Appeals were convinced that *Brown Shoe* standards applied in this case, and Petitioners never before found the law "muddled" until faced with the unequivocal jury verdict and judgment herein. Such a result-oriented plea should not now be heard.

Petitioners' attack upon the trial court's *Brown Shoe* jury charge attempts to distract this Court's attention from the propriety of the trial court's instructions, and conceals the fact that the market definition hypothesis now posited by Petitioners is totally at odds with the very jury instructions which they repeatedly requested and which were substantially adopted by

the trial court. Even if the trial court erred in basing its market definition instruction on the relevant factors discussed in *Brown Shoe* (which it did not), it would have been an error invited by Petitioners' own requested charge, and therefore one which they should be barred from relying upon now.[2]

On July 29, 1977, Petitioners filed a proposed jury charge, basing product market delineation on flexibility of production facilities, while ignoring the various other *Brown Shoe* factors (CA App. at 2392-3). The court rejected this version which, as worded, would have been equivalent to granting a directed verdict for Petitioners (CA App. at 2515). On August 9, 1977, Petitioners objected to the court's preliminary draft charge (CA App. at 2533), and submitted a more detailed requested market instruction, including reference to all seven of the *Brown Shoe* market criteria (CA App. at 2518-27).

The August 9 request is significant in two respects. First, it became Petitioners' "bible" as to the market issue, insisted upon by them in their obfuscated objections to the preliminary charge (CA App. at 2533), then in their August 22, 1977 objections to the court's third draft charge (CA App. at 2573), and finally in their October 17, 1977 motion for new trial (CA App. at 2639). Secondly, the contents of the proposed August 9 market instruction reveal the extent to which their consistent endorsement of the *Brown Shoe* criteria has now changed, chameleon-like, in their desire to overcome the effects of their own request. In their requested instruction Petitioners enumerated the various *Brown Shoe* indicia including, with no particular emphasis, production facility flexibility:

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[2] A party who has requested an instruction has invited any error in it and cannot complain if the instruction, or one substantially like it, is given. Wright & Miller, *Federal Practice and Procedure:* Civil §2558 (1971) at 675, and cases cited therein. *See also Glasscock* v. *Wilson Constructors, Inc.*, 627 F.2d 1065 (10th Cir. 1980); *Trawick* v. *Manhattan Life Insurance Co.*, 484 F.2d 535 (5th Cir. 1973); *Solomon Dehydrating Co.* v. *Guyton*, 294 F.2d 439 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961).

> If, on the other hand, you find that the installation of avionic and electronic equipment on a Grumman G-II does not have peculiar characteristics and does not require unique productions facilities as compared to such installation in other aircraft, particularly other large corporate, private, and governmental aircraft, then this is *some evidence* that the installation of electronic and avionic equipment in Grumman G-II's is not the relevant submarket for purposes of this antitrust case. [CA App. at 2520] [Emphasis supplied].

Significantly, in summarizing the indicia, Petitioners asked that the jury be instructed:

> In making this decision, I caution you that *none of the seven indicators of a submarket are more important than the others*. The existence or non-existence of one indicator is not determinative. . . . Furthermore, some of the indicators may suggest a submarket of one scope and other of the indicators suggest a submarket of a larger or smaller scope. You must, therefore, examine *all* of the indicators and decide after weighing *all* of them whether or not a submarket exists, and, if so, the boundaries of that submarket. [CA App. at 2525]. [Emphasis supplied].

In stark contrast to the requested charge, Petitioners now assert for the first time that a *Brown Shoe* relevant product market instruction is totally inadequate (1) unless it informs the jury that two criteria (selected by Petitioners) are more important than all the others, and that the remainder are merely evidentiary of the basic two (Petition, p. 12); and (2) unless it informs the jury that the "central issue" in the case is supplier substitutability (Petition, p. 13, 14); and (3) unless it instructs the jury on the respective weight to be given the relevant factors (Petition, p. 15); and, completing Petitioners' turnabout, (4) unless the jury is instructed that *Brown Shoe's* indicia are of *varying importance* (Petition, p. 16).

Thus, Petitioners, now realizing that their only favorable evidence pertained to production facility flexibility (now called supplier substitutability), seek to elevate that factor to controlling significance. Petitioners' contention fails for three reasons: (1) it is an incorrect statement of the law, completely at odds with this court's decision in *Brown Shoe* and its progeny. *See, e.g., Heatransfer Corp., supra; Pacific Coast Agricultural Export Association, supra*; (2) it contradicts the very market instruction they repeatedly demanded; and (3) it ignores the fact that even the single market definition criterion Petitioners rely on was a fiercely controverted factual issue.[3] Enforcing the jury's finding, the Court of Appeals listed some of the evidence supporting Respondent's position. App. A at 10a. Petitioners themselves concede the presence of additional record evidence contradicting their assertion of production facility flexibility (Petition, p. 14).

Petitioners present concentration upon the single index of production facility flexibility is predictable in view of the absence of evidence favorable to them under the other *Brown Shoe* criteria. However, the trial court clearly instructed the jury that the factors of uniqueness of production facilities and specialized vendors must be considered by them, along with other specified factors, in reaching their conclusion. Petitioners' assertion (Petition, p. 16) that a lay jury would not understand a *Brown Shoe* instruction because they were unfamiliar with the legal and economic concepts involved, ignores the fact that the jury had the benefit of eleven weeks of evidentiary presentations along with detailed instructions from the trial court and the arguments of counsel to supplement their understanding of the

[3] Relevant market has been unequivocally recognized as being a question of fact heavily dependent on the characteristics of the particular industry involved. *See Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

issues involved. Unfortunately for Petitioners, the jury's understanding of the issues resulted in answers adverse to Petitioners on all special interrogatories submitted. No court has held that flexibility of production facilities is dispositive of the relevant product market issue as a matter of law.

Petitioners' requested relevant product market instruction has been further abandoned and a contrary concept proposed to this Court in another important respect. Petitioners now write off the "user substitutability" factor as wholly insignificant in the market definition determination, inasmuch as the owner of a G-II aircraft obviously needs G-II avionics (Petition, p. 13). Petitioners' admission does *not* eliminate the significance of user substitutability as a consideration, but, quite the contrary, conclusively establishes this factor in favor of the market found by the jury. Moreover, Petitioners now contradict the applicable instruction they repeatedly sought at trial, which was as follows:

> . . . in one sense, the customer for the installation of such equipment in a Grumman G-II aircraft will always be distinct because he must be the owner of a G-II aircraft. However, that fact does not, for purposes of this case, solve the problem. Rather, the issue is whether or not the customer who purchases a G-II aircraft and therefore must have such installations performed is somehow distinct or different from the customer who purchases another type of aircraft, particularly other large corporate private, or governmental aircraft. [CA App. at 2521].

Respondent respectfully submits that the trial court's relevant product market definition was in accordance with this Court's formulation in *Brown Shoe*, and with the very jury instructions which Petitioners requested, but now disavow. Consequently, such instructions do not form a proper basis for review.

II.

THE JURY INSTRUCTION ON VIOLATION OF SECTION 1 OF THE SHERMAN ACT APPROVED BY THE FIFTH CIRCUIT IS ADEQUATE TO MEET THE "INJURY TO COMPETITION" TEST AND IS NOT IN CONFLICT WITH JURY INSTRUCTIONS PREVAILING IN OTHER CIRCUITS. FURTHER, THE PORTION OF THE INSTRUCTIONS NOW ATTACKED BY PETITIONERS WERE GIVEN IN SUBSTANTIALLY THE FORM THEY REQUESTED.

Petitioners erroneously contend that the Court of Appeals approved the trial court's judgment without any showing of an injury to competition. To the contrary the Court of Appeals unequivocally "held that there were significant and more-than-temporary harmful effects on competition, shown in part by the rise in prices charged to customers and the rise in Page's profits over the profits Associated took." App. A at 21a. Petitioners, realizing that injury to competition was shown, now attack the sufficiency of the instructions on the "rule of reason" test of illegality.

In so doing, Petitioners posit a specious instructional conflict among the Circuits which conveniently ignores that the instructions given by the trial court were substantially similar to those requested by Petitioners.[4] Thus, Petitioners have failed to

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[4] Petitioners asked the trial court to give their requested instruction No. 3, submitted August 9, 1977 (CA App. at 2528). This request states in pertinent part:

> . . . On the contrary, the purpose of the act was to prohibit those restraints of trade which are *reasonably calculated to prejudice the interest of the public,* that is, the interest of the buyers or consumers of the product or service in question.
>
> The injury, if any, suffered by the Plaintiffs, Associated Radio Co. and Associated Radio Service Co., is a private injury which is not necessarily the type of injury which *tends to or is reasonably calculated to injure the buyers of installation services in the relevant market.* [CA App. at 2528]. See footnote 2 above.

preserve the point which they now assert.[5]

What Petitioners now claim to be splits of authority among the Circuits are at most different articulations of the same standard. While the Circuits' articulations of injury to competition may vary in the differing contexts of the individual cases and records, which necessarily involve different degrees of "impact" on competition underlying antitrust liability, no conflict between Circuits exists.

The cases cited by Petitioners from other Courts of Appeal which allegedly conflict with the "rule of reason" instructions in this case are not in conflict.[6] In each of these cases the Court of Appeals held that a plaintiff who alleges unfair competition must prove injury to competition. This is the identical holding of the Court of Appeals in this case.[7]

Thus the Fifth Circuit has not adopted a unique test for determining when acts of unfair competition violate the antitrust

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[5] Petitioners' objections to the charge at trial (CA App. at 2572-73) did not have the specificity required by Rule 51, Federal Rules of Civil Procedure, to afford the trial court an opportunity to correct the alleged error in the instructions now being asserted. *Wilson* v. *Crouse-Hinds Co.*, 556 F.2d 870 (8th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Delancey* v. *Motichek Towing Service, Inc.*, 427 F.2d 897 (5th Cir. 1970).

[6] Petition, p. 23, n. 30. To the contrary, the Court in *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 101 S.Ct. 571 (1980), relied upon by Petitioners, held that the burden of showing public injury may be met by evidence that defendant's conduct tended to or was reasonably calculated to prejudice the public interest. The court approved an instruction which contained identical language given in the instant case, to-wit: "tends or is reasonably calculated to prejudice the public interest." 624 F.2d at 810.

[7] These cases, as well as the instant case, make clear that the *Pick-Barth* [*Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932)] *per se* doctrine is not to apply and that a plaintiff who alleges unfair competition must prove injury to competition. App. A at 13a-14a.

laws. The Court of Appeals follows the rule that injury to competition must be shown and, after careful consideration of Petitioners' challenge, held that the charge was adequate to withstand the objections. App. A at 20a. The test announced by the Court of Appeals is not in conflict with a decision of this Court or of another Court of Appeals on the same matter and provides no legitimate basis for the exercise of this Court's power of review.

Finally the instant case is hardly an appropriate one to review semantic differences in jury instructions on injury to competition in view of the Fifth Circuit's finding of overwhelming evidence of such injury. App. A at 12a-20a. Such a clarification is even more inappropriate in view of the limited scope of Fifth Circuit's holding:

> This opinion should not be read to encourage all who suffer injury to business or property through an alleged business tort to bring suit under section 1 or 2 of the Sherman Act. *The holding of this case rests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered.* (Emphasis supplied) App. A at 30a.

III.

THE JURY INSTRUCTIONS ABOUT WHICH PETITIONERS NOW COMPLAIN CONCERNING LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT WERE SUBSTANTIALLY THOSE REQUESTED BY PETITIONERS. THESE INSTRUCTIONS WERE LEGALLY CORRECT.

Petitioners' third question presented for review is made contingent upon this Court's granting the Petition on one of the first two questions presented (Petition, p. 27). The trial court's instructions pertaining to Section 2 of the Sherman Act (set out at length in the Fifth Circuit's opinion) were thorough and correct. Petitioners now assert that the jury should have been asked to make a fact finding as to each instance of predatory conduct

supporting Respondent's Section 2 claims and represent that they had proposed just such jury interrogatories. (Petition, p. 28, n. 40) In fact, no such interrogatories concerning Section 2 were ever proposed.

Petitioners' requested special interrogatories were grouped into those pertaining to alleged violations of Section 1 (Interrogatories 2-7) (CA App. 2470-97), and those pertaining to alleged violations of Section 2 (Interrogatories 11-19) (CA App. 2501-09). In each of these separate groupings, Petitioners clustered their proposed interrogatories as to liability, proximate causation and amount of damages with respect to the particular Sherman Act section allegedly violated.

Significantly, Petitioners' only requested special interrogatory addressing the commission of specific unfair acts (Special Interrogatory No. 4; CA App. 2472-92) was requested in connection with Section 1, and *not* in connection with Section 2. This is confirmed by the wording of their proposed Special Interrogatory No. 5 (CA App. 2493) wherein, as a follow-up to the preceding interrogatory, Petitioners requested that the jury determine, as to each of the acts which they found had been committed, whether each "unreasonably restrained competition." No such "laundry list" of issues was *ever* requested by Petitioners in relation to the alleged violation of Section 2. Rather, in their requested instruction to Special Interrogatory No. 11, Petitioners themselves asked that the jury be generally instructed that the definition of monopoly power is the ability to control prices and exclude competition (CA App. at 2460-1), and that, should Petitioners be found to have such power, even then no offense would result if such power were acquired by a lawful concentration of legitimate sales effort in the business monopolized.

The Court's actual Section 2 instructions (quoted by the Court of Appeals at App. A, p. 25a-28a) are remarkably similar to those requested by Petitioners, cautioning the jury that mere

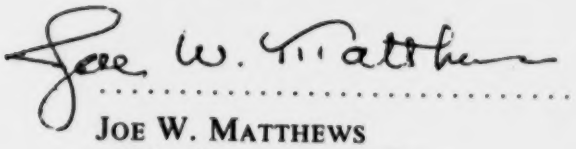
possession of monopoly power is insufficient to find an antitrust violation, where it is acquired by virtue of a superior product or business acumen, and is achieved through purely legitimate means. *See United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). Again, Petitioners cannot be heard to attack the sufficiency of jury instructions substantially identical to those they requested, and which were totally correct.[8] Nor can they now legitimately complain about the lack of an instruction that they never requested.

[8] See footnote 2 above.

CONCLUSION

This case was correctly decided on the facts and law in the lower courts. The questions presented by the petition, taken individually or as a whole, provide no basis for the exercise of this Court's powers of review, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted:



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